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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MANUEL LOMA-TORRES, Defendant.	Criminal Case No. 078CR0538-IEG DATE: July 7, 2008 TIME: 2 p.m. Honorable Irma E. Gonzalez Courtroom 1 GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANTS MOTIONS TO (1) DISMISS THE INDICTMENT; (2) STRIKE SURPLUSAGE FROM THE INDICTMENT; (3) PRODUCE GRAND JURY TRANSCRIPTS; (4) SUPPRESS STATEMENTS; (5) COMPEL DISCOVERY AND PRESERVE EVIDENCE; AND (6) GRANT LEAVE TO FILE FURTHER MOTIONS TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Steven De Salvo, Assistant U.S. Attorney, and hereby files its Response and Opposition to the Defendant's motions in the above-referenced case. Said motions are based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

STATEMENT OF THE CASE

Defendant Manuel Loma-Torres ("Defendant") was indicted by a grand jury on February 27, 2008, and charged with being a deported alien found in the United States in violation of 8 U.S.C. § 1326. The Indictment includes a special allegation that Defendant was deported, removed, and excluded after June 6, 2006.

II

STATEMENT OF FACTS[1/]

On January 27, 2008, Senior Patrol Agent Luis E. Burruel was informed by local police that Defendant and another alien had been found walking in an agricultural area about four miles northwest of Brawley, California. When Agent Burruel arrived, he asked Defendant where he was a citizen or national, and Defendant replied that he was from Mexico and admitted that he had crossed into the United States without permission. Defendant was then taken into custody and advised of their administrative rights. Later, while being transported to the station, Agent Burruel asked Defendant if he had been previously deported, and Defendant replied "yes." The agent asked whether he had served time in jail, and Defendant admitted that he had done time in jail for illegal drugs. At the station, Defendant was advised of his Miranda rights and agreed to answer questions without a lawyer. During his post-Miranda statement, which was videotaped, Defendant admitted that he was a citizen of Mexico, and that had illegally crossed into the United States by crossing through the mountains, and that he had been previously deported.

III

POINTS AND AUTHORITIES

A. THE MOTION TO DISMISS THE INDICTMENT SHOULD BE DENIED

Defendant raises several arguments in support of his motion to dismiss – all of which are without merit.

First, Defendant argues that the government has failed to properly allege all elements of the

[1/] These facts are taken from the Record of Deportable/Inadmissible Alien (I-213 Form), and the Continuation Page for that form, which are attached hereto as Exhibit A.

offense – namely, the specific date of removal after his prior felony conviction. Defendant, relying on United States v. Salazar-Lopez, 506 F.3d 748, 751-52 (9th Cir. 2007), argues that the indictment's allegation that defendant was removed "subsequent to" the date of the prior conviction is not sufficient.. However, Salazar-Lopez actually supports the indictment against this Defendant. Specifically, the Ninth Circuit stated that "the date of the removal, or at least the fact that [Defendant] had been removed *after* his conviction, should have been alleged in the indictment and proved to the jury." Salazar-Lopez,506 F.3d at 752 (emphasis added). The indictment addressed by the Ninth Circuit in Salazar-Lopez did not have the requisite language, and therefore the Court performed a harmless error analysis. Id. at 752-754. Here, however, the indictment expressly states: "It is further alleged that defendant, JUAN MARTINEZ-PERALTA, was removed from the United States subsequent to March 9, 2004." Because only this language is required by the Ninth Circuit, Defendant's claim regarding the lack of specificity as to the date of removal must be denied.

Second, Defendant argues that the indictment fails to allege several elements of the offense. For the same reason, he also argues that his right to presentment was violated. He also argues that, if the date of removal is not, as the government claims, an element of the offesne, But, as Defendant himself concedes, that argument is foreclosed by United States v. Rivera-Sillas, 376 F.3d 887 (9th Cir. 2001).

B. THE MOTION TO DISMISS ON GROUNDS THAT THE JURY WAS MISINSTRUCTED SHOULD BE DENIED

Defendant alleges that District Judge Larry A. Burns on January 11, 2007, misinstructed the grand jury at its empanelment. Although recognizing that the Ninth Circuit in United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005) (en banc) generally found the grand jury instructions constitutional, Defendant here contends Judge Burns went beyond the text of the approved instructions, and by so doing rendered them improper to the point that the indictment should be dismissed. Defendant's argument is wholly without merit.

In his instructions to the grand jurors, Judge Burns told the jurors that they could not judge the wisdom of the criminal laws, stating:

> You understood from the questions and answers that a couple of people were excused, I think three in this case, because they could not adhere to the principle that I'm about to tell you.

> But it's not for you to judge the wisdom of the criminal laws enacted by congress; that is, whether or not there should be a federal law or should not be a federal law designating certain activity is criminal is not up to you. That's a judgment that congress makes.
>
> And if you disagree with the judgment made by congress, then your option is not to say "Well I'm going to vote against indicting even though I think that the evidence is sufficient" or "I'm going to vote in favor of even though the evidence may be insufficient." Instead, your obligation is to contact your congressman or advocate for a change in the laws, but not to bring your personal definition of what the law ought to be and try to impose that through applying it in a grand jury setting.

Partial Transcript at 8-9.

Judge Burns' instruction was proper. In Navarro-VargasII, the Ninth Circuit upheld grand jury instructions forbidding grand jurors from judging the wisdom of the criminal laws. The Ninth Circuit stated: "If a grand jury can sit in judgment of wisdom of the policy behind a law, then the power to return a no bill in such cases is the clearest form of 'jury nullification.' Furthermore, the grand jury has few tools for informing itself of the policy or legal justification for the law; it receives no briefs or arguments from the parties. The grand jury has little but its own visceral reaction on which to judge the 'wisdom of the law.'" 408 F.3d at 1203.

Defendant, however, claims that Judge Burns' instructions impermissibly precluded the grand juror's "perogative not to indict" even if the evidence establishes probable cause that the person has committed a crime. Memorandum at 6. Contrary to Defendant's claim, Judge Burns' instruction did not pressure the grand jurors to give up their discretion not to return an indictment. Judge Burns' words cannot be parsed to say that they flatly bars the grand jury from declining to indict because the grand jurors disagree with a proposed prosecution. That aspect of a grand jury's discretionary power (i.e. disagreement with the prosecution) was dealt with in Navarro-Vargas in its discussion of another instruction not at issue here. 408 F.3d at 1204-06 ("'Should' Indict if Probable Cause Is Found"). This other instruction bestows discretion on the grand jury not to indict. In finding this instruction constitutional, the court stated in words that ring true here, "It is the grand jury's position in the constitutional scheme that gives it its independence, not any instructions that a court might offer." 408 F.3d at 1206. While the new grand jurors were told by Judge Burns that they could not question the wisdom of the criminal laws per Navarro-Vargas, they were also told by Judge Burns they had the discretion not to return an indictment per Navarro-Vargas. See Merced v. McGrath, 426 F.3d 1076, 1079-80 (9th Cir. 2005). Thus, there was no error requiring dismissal of this indictment or any other indictment by this Court exercising its supervisory powers.

Finally, should be "reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure." United States v. Williams, 504 U.S. 36, 50 (1992). Moreover, a court should not exercise this power absent a showing that the defendant is "actually prejudiced by the misconduct." United States v. Isgro, 974 F.2d 1091, 1094 (9th Cir. 1992). Even if there was error, Defendant has proffered no facts supporting a claim of actual prejudice in this case. Accordingly, his argument should be dismissed on that basis alone. "Absent such prejudice – that is, absent 'grave' doubt that the decision to indict was free from the substantial influence of [the misconduct]' – a dismissal is not warranted." Id.

______Defendant also argues that because Judge Burns instructed the grand jurors that Assistant U.S. Attorneys were "duty-bound" to present exculpatory evidence, see Partial Transcript at 20, he gave the impression that no exculpatory evidence exists when the prosecutor does not present such evidence. This argument is without merit and is inconsistent with the holding in United States v. Williams, 504 U.S. 36, 50 (1992), which held that federal courts do not have supervisory authority to require prosecutors to disclose exculpatory evidence.

The fact that Judge Burns' statement contradicts Williams, but is in line with self-imposed guidelines for United States Attorneys, does not create the constitutional crisis proposed by Defendant, for two reasons. First, no improper inference was created when Judge Burns reiterated what he knew to be a self-imposed duty on federal prosecutors. Simply stated, in the vast majority of the cases the reason the prosecutor does not present "substantial" exculpatory evidence, is because no "substantial" exculpatory evidence exists. If it does exist, the evidence, as mandated by U.S. Attorney policy, should be presented to the grand jury by the Assistant U.S. Attorney upon pain of possibly having his or her career destroyed by an Office of Professional Responsibility investigation. Even if there is some nefarious slant to the grand jury proceedings when the prosecutor does not present any "substantial" exculpatory evidence, because there is none, the negative inference created thereby in the minds of the grand jurors is legitimate. In cases such as Defendant's, the Government has no "substantial" exculpatory evidence generated from its investigation or from submissions tendered by the defendant. There is nothing wrong in this scenario with a grand juror inferring from this state-of-affairs that there is no "substantial" exculpatory evidence.

Second, just as the instruction language regarding the United States Attorney attacked in Navarro-Vargas was found to be "unnecessary language [which] does not violate the Constitution," 408 F.3d at 1207, so too the "duty-bound" statement was unnecessary when charging the grand jury concerning its relationship with the United States Attorney and her Assistant U.S. Attorneys, and does not violate the Constitution. In United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992) the Ninth Circuit while reviewing Williams established that there is nothing in the Constitution which requires a prosecutor to give the person under investigation the right to present anything to the grand jury (including his or her testimony or other exculpatory evidence), and the absence of that information does not require dismissal of the indictment. 974 F.2d at 1096 ("Williams clearly rejects the idea that there exists a right to such 'fair' or 'objective' grand jury deliberations."). Thus, while the "duty-bound" statement was an interesting tidbit of information, it was unnecessary in terms of advising the grand jurors of their rights and responsibilities in their deliberations, and does not cast an unconstitutional pall upon the instructions which requires dismissal of the indictment in this case. Judge Burns repeatedly "remind[ed] the grand jury that it stands between the government and the accused and is independent," which was required by Navarro-Vargas. 408 F.3d at 1207. In this context the unnecessary "duty-bound" statement does not mean that "'structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice' to the defendant," and "[the] defendant can[not] show a history of prosecutorial misconduct that is so systematic and pervasive that it affects the fundamental fairness of the proceeding or if the independence of the grand jury is substantially infringed." Isgro, 974 F.2d at 1094 (Citation omitted). Therefore, this indictment need not be dismissed.

C. DEFENDANT IS NOT ENTITLED TO GRAND JURY TRANSCRIPTS

Defendant seeks production of the grand jury transcripts yet fails to support his motion with anything even remotely approximating the requisite need to invade the sanctity of the grand jury's deliberations. As such, his motion should be denied.

The need for grand jury secrecy remains paramount unless the defendant can show "a particularized need" that outweighs the policy of grand jury secrecy. United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986); United States v. Murray, 751 F.2d 1528, 1533 (9th Cir. 1985). The grand jury may indict someone based on inadmissible evidence or evidence obtained in violation of the rights of the accused.[2] Tracing the history of the grand jury from English common law, the U.S. Supreme Court has observed that grand jurors were not hampered by technical or evidentiary laws, and traditionally could return indictments based not on evidence presented to them at all, but on their own knowledge of the facts. See Costello, 350 U.S. at 363. In light of this tradition, the Court held that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," and that grand jury indictments could not be challenged based on the insufficiency or incompetence of the evidence. Id. Rather, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." Id. at 409. In this case, there is no extraordinary basis to support Defendant's request for grand jury transcripts.

D. DEFENDANT'S FIELD STATEMENTS WERE NOT TAKEN IN VIOLATION OF *MIRANDA*

Defendant claims that his statements must be suppressed because they were not obtained in compliance with Miranda. As indicated in Exhibit A, Defendant made a post-arrest statement in which agents fully complied with Miranda – indeed, Defendant signed a waiver form expressly giving up his Miranda rights. Apparently, Defendant also seeks to suppress statements made before this Miranda advisement. However, his motion should be denied insofar as any statement made in the field, during an investigatory detention, did not require a Miranda warning. Insofar as the Defendant seeks suppression of any pre-Miranda statements made during the transportation of the Defendant –

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[2] See, e.g., United States v. Mandujano, 425 U.S. 564 (1976) (indictment brought based on evidence obtained in violation of defendant's right against self-incrimination); United States v. Calandra, 414 U.S. 338, 343 (1974); United States v. Blue, 384 U.S. 251 (1966) (indictment brought based on evidence obtained in violation of defendant's right against self-incrimination) ; Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359, 363 (1956) ("neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act"); see also Reyes v. United States, 417 F.2d 916, 919 (9th Cir. 1969); Johnson v. United States, 404 F.2d 1069 (9th Cir. 1968); Wood v. United States, 405 F.2d 423 (9th Cir. 1968); Huerta v. United States, 322 F.2d 1 (9th Cir. 1963).

specifically, statements regarding his prior conviction and deportation – the United States does not seek to admit those statements at trial.

As indicated in Government's the investigation report, see Exhibit A, Defendant made statements in the field, prior to being arrested and transported, regarding his immigration status. The Defendant was only being detained while the agent was conducting his investigation. The Defendant was not in custody – so the requirements of Miranda do not apply. "A defendant is in custody when, based upon a review of all the pertinent facts, a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." United States v. Wauneka, 770 F.2d 1434, 1438 (9th Cir. 1985) (internal quotations omitted and emphasis added); see also United States v. Bravo, 295 F.3d 1002 (9th Cir. 2002), cert. denied, 123 S. Ct. 1775 (2003). Specifically, courts must determine "whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam). This Court announced five factors that are relevant:

> Factors relevant to whether an accused is "in custody" include the following: (1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual.

United States v. Hayden, 260 F.3d 1062, 1066-67 (9th Cir. 2001) (citations and internal quotations omitted). If a person is merely subjected to a brief investigatory detention, he or she is not entitled to Miranda warnings. See, e.g., United States v. Woods, 720 F.2d 1022, 1029 (9th Cir. 1983).

Apprehensions near the border for the purpose of brief investigatory detentions are not custodial in nature. United States v. Galindo-Gallegos, 244 F.3d 728, 731 (9th Cir.), modified by 255 F.3d 1154 (9th Cir. 2001) (upholding admission of field statements without Miranda warning where Border Patrol agents asked a group of persons near the border what country they were from and whether they had a legal right to be in theUnited States).

Nor was the questioning in this case – which pertained to the Defendant's immigration status – "interrogatory" in nature sufficient to trigger Miranda. It is well settled that "[r]outine questioning by the Coast Guard or Customs officials is not the sort of custodial situation that normally triggers the

Miranda requirement." United States v. Troise, 796 F.2d 310, 314 (9th Cir. 1986). While immigration questioning away from the border may trigger the need for Miranda, it was not triggered in this case, when Defendant was encountered in a remote area north of the international border at night, in an area heavily trafficked by illegal aliens.

D. DEFENDANT IS NOT ENTITLED TO EVIDENTIARY HEARING ON VOLUNTARINESS IN ABSENCE OF DECLARATION

Defendant's request for an evidentiary hearing on the issue of voluntariness of his field admissions should be denied. Under Ninth Circuit and Southern District precedent, as well as a Southern District Local Rule, a Defendant is entitled to an evidentiary hearing on a motion to suppress on the basis of voluntariness only when the Defendant adduces specific facts sufficient to require the granting of Defendant's motion. United States v. Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989) (where "defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer, ... the district court was not required to hold an evidentiary hearing"); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (boilerplate motion containing indefinite and unsworn allegations was insufficient to require evidentiary hearing on defendant's motion to suppress statements); Crim. L.R. 47.1. Defendant has produced no such declaration.

Requiring a declaration from a defendant in no way compromises defendant's constitutional rights, as declarations in support of a motion to suppress cannot be used by the government at trial over a defendant's objection. Batiste, 868 F.2d at 1092 (proper to require declaration in support of Fourth Amendment motion to suppress); Moran-Garcia, 783 F. Supp. at 1271-74 (extending Batiste to Fifth Amendment motion to suppress).

Nor is it reasonable to object that a defendant will have less information that the government, and so should not be required to provide proof to support a motion. Batiste, 868 F.2d at 1092. At least in the context of motions to suppress statements, which require police misconduct incurred by defendant while in custody, defendant certainly should be able to provide the facts supporting the claim of misconduct infringing on his voluntariness.

Defendant cannot claim that 18 U.S.C. § 3501 requires an evidentiary hearing in every case is of no merit. Section 3501 requires only that the Court make a pretrial determination of voluntariness "out of the presence of the jury." Nothing in section 3501 betrays any Congressional intent to alter the longstanding rule vesting the form of proof on matters for the court in the discretion of the court. Batiste, 868 F.2d at 1092 ("Whether an evidentiary hearing is appropriate rests in the reasoned discretion of the district court.") (citation and quotation marks omitted).

The Ninth Circuit has expressly stated that a government proffer based on the statement of facts attached to the complaint is alone adequate to defeat a motion to suppress where the defense fails to adduce specific and material facts. Batiste, 868 F.2d at 1092. As the Defendant in this case has failed to provide a declaration alleging specific and material facts, the Court would be within its discretion to deny Defendant's motion based solely on the statement of facts attached to the complaint in this case, without any further showing by the Government.

In this case, the Government has attached to this motion the Report of Investigation of an agent who was present during Defendant's advisement of rights. See Exhibit A. These documents, though hearsay, may be considered by the Court in making pretrial rulings, Fed. R. Evid. 1101, and suffice to show at this stage, in the absence of a declaration from Defendant, that there is no legitimate issue as to Miranda or Defendant's voluntariness of his statement.

III

CONCLUSION

The Government respectfully requests that the Court deny Defendant's motions for the reasons stated above.

DATED: July 6, 2008

Respectfully submitted,
KAREN P. HEWITT
United States Attorney

STEVEN DE SALVO
Assistant U.S. Attorney

UNTIED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MANUEL LOMA-TORRES, Defendant.	)	Criminal Case No. 08CR0538-IEG CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Steven De Salvo, am a citizen of the United States over the age of 18 years and a resident of San Diego County, California; my business address is 880 Front Street, Room 6293 San Diego, California 92101-8800; I am not a party to the above-entitled action, I filed **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS** by filing it through the ECF system and causing notification to defense counsel by email to the following:

Jennifer Coon, Federal Defenders

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 6, 2008

/s/ Steven De Salvo
Steven De Salvo